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Legal Affinities

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LEGAL AFFINITIES

*Joseph Vining**

I.

Not long ago, any question of the kind "How may theology serve as a resource in understanding law?" would have been hardly conceivable among lawyers. When Lon Fuller brought out his first book in 1940, *The Law in Quest of Itself*, he could think of no better way of tagging his adversary the legal positivist than to note a "parallel between theoretical theology and analytical jurisprudence."[1] Two decades later, in the name of realism, Thurman Arnold dismissed Henry Hart's non-positivist jurisprudence in harsh terms. A master of the cutting phrase, he confidently entitled his attack "Professor Hart's Theology."[2] Two decades after that, in the late 1970's, Grant Gilmore ended his summa *The Ages of American Law* with the strong claim, "In Heaven there will be no law . . . . In Hell there will be nothing but law."[3] The disassociation of theology and law, or law truly understood, seemed complete, and the only question was what direction legal thinking should take now that it was free of its theological roots.

Today the list of those writing and thinking about law who have come back to theology for help, or at least begun to cast an eye in its direction, is long.[4] And of those who have made the appeal or taken what may be called the theological turn, not all know or would say they have religious faith. The theological turn has been

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[1] L. FULLER, THE LAW IN QUEST OF ITSELF 81 (1940).

[2] Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960).

[3] G. GILMORE, THE AGES OF AMERICAN LAW 111 (1977).

[4] A representative selection would include Frank S. Alexander, Milner S. Ball, Harold J. Berman, Robert A. Burt, Robert M. Cover, Roger C. Cramton, Ronald R. Garet, Frederick Mark Gedicks, Mary Ann Glendon, David Granfield, David L. Gregory, Thomas C. Grey, Arthur Allen Leff, Warren Lehman, Sanford Levinson, J.R. Lucas, Andrew W. McThenia, John T. Noonan, Michael J. Perry, H. Jefferson Powell, Thomas L. Shaffer, Philip Soper, William Stringfellow, Roberto Mangabeira Unger, Howard John Vogel, James Boyd White, and John Witte, Jr.

so quick—in the frame of intellectual history—that I wonder at my slightly apologetic tone in the last chapter of *The Authoritative and the Authoritarian*,[5] written in 1981. Perhaps I was surprised at the turn my own mind had taken.

Is this an indication or, more, is this because we are entering what many want to term a "post-modern" age? An indication, perhaps; a factor, which our children and their children may choose to disentangle; but not, I think, a result. A post-modern age still lies ahead. While it is true the traditional social sciences—history, sociology, politics—appear to have begun pulling back from their various moves into the territory of applied mathematics and experimental method, the traditionally harder sciences have begun to push forward into fields formerly left to students of the distinctively human. For each who has pulled back from mathematics as the model of human language because of the tendency in mathematical thought to assume units of reference that have closed and unvarying identities, another has embraced and extended a mathematical model of language. The claim of dualism, that initial division of spirit and matter allowing scientific inquiry to go forward, a claim troubling enough to those grappling with incarnation and all incarnation implies, is very possibly in the course of being replaced for many by a monism in which the spirit has been left behind—though in attending to the testimony around us on so large a matter, we cannot put aside the question of witnesses' belief in what they say as evidenced by all they say and do in their lives.

I would thus not be inclined to draw heavily on the age in seeking to understand why, at this point, so substantial a number of lawyers are where they are in their meeting with theology, and what may lead them and others to continue it. Professional legal interest in theology has proceeded much less from a grand movement of thought than from internal affinities that have always been with us, and that dipped out of sight, though not out of practice, only briefly. Law and theology—or more concretely, lawyers and theologians in their activity—are linked and have always been linked in method, linked in the problems they encounter, and linked in their object.

For the theologian, to whom the very idea of sidling up to law may be distasteful, the first response to any such statement may

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[5] J. VINING, THE AUTHORITATIVE AND THE AUTHORITARIAN ch. 14 (1986).

be that law is well known to be the opposite of true theology. Law is what kills the spirit. But the fact the word "law" is used as a pejorative does not mean that is what law is. Lawyers too have a name for such a conception of law. It is "legalism."[6] Again the response might be, but why are the affinities not between law and canon or other religious law? The short answer is that in looking for help in grappling with one's problems and in understanding oneself, it is more useful to look to a sister than to a twin. One who is exactly the same will do exactly what one does oneself; one who is alike, but different, may go forward in a different way, and beckon on. Finally it might be said the profitable juxtaposition is law and religion rather than law and theology. But while the etymology of our English noun *religion* has in it the verbs and (significantly) the actions and the activity "*reading again*" and "*binding*," redolent of text, method, and authority, religion is not to be confined to what Mercia Eliade calls "religions of the Book" (Judaism, Christianity, Islam) or "books" (Hinduism or some Buddhism).[7] Nor would one attribute to religion a "method" or seek the "method" of religion. But method is salient in theology, as in any articulated reflection upon living value and the actualities of human experience; and the word "law" when not used as a pejorative is properly held to the self-reflecting.

II.

I have indicated what I think are three parts of the connection between law and theology, three distinguishing and related major foci of concern: method, problem, and object. Legal and theological "method," in its most reduced and summary form, has to do with language; "problem," with belief; and "object," with true authority, authority for responsible action, and ultimately with personification—though in saying this last I realize I may be pulling back from the fully ecumenical.

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[6] Known and used also by those for whom law may be a synonym for theology. *See* H. GREENSTEIN, JUDAISM—AN ETERNAL COVENANT (1983); F. RAHMAN, ISLAM AND MODERNITY (1982). In much theological writing, a contrast between law and spirit is entirely implicit, the character of "law" and the "legal" presumed to be so well-known that even short reference to the "not-legal" is thought to be descriptive. See, for example, Karl Rahner's use of "legal" and "juridical" in his discussion of hierarchy and authority in the Roman Catholic Church in K. RAHNER, THEOLOGY FOR RENEWAL 25-29 (1964).

[7] M. ELIADE, THE SACRED AND THE PROFANE 163 (1959).

The methodological connection flows not just from the centrality of texts and the handling or reading of them in both disciplines, but from common methodological presuppositions—of the authenticity of speech, of the existence of a speaker, of the existence indeed of a speaker who is not an individual. There are in both law and theology presuppositions of the transcendence of time and culture, the possibility of a living translation over time and between cultures, which in turn depend upon an overarching presupposition of mind. In both law and theology there is the presupposition of human responsibility. There is even what we might call a presupposition of intimations, that truth can be perceived before it can be fully articulated and placed, which makes the practice of those who are not articulate relevant to serious work in either field. And these presuppositions are acted upon in analysis while work goes forward to maintain them in actuality or make possible their realization in actuality. Hearing them stated thus, by a lawyer, some theologians may wonder whether law is not just an old theology, for some theologies may have fallen away from them, particularly theology in its process form. On the other hand some very recent literary criticism, demanding faith in real presences,[8] may be edging toward them. But for the moment, and in the large, I think they are behind the family resemblances of law and theology.

The problems with which both law and theology deal connect them, and make them distinctive, in a most striking way. Both struggle with the phenomenon of punishment—with retribution, blame, expiation, forgiveness; other disciplines are happy to leave it to them. Both face the problem of deference in a wide variety of forms. They entertain the possibility that some may be better than others at understanding texts, which in turn bespeaks an assumption that there is something to be understood; yet still there can be found, in both, a deference to belief, if it is authentic belief in which a whole and responsible person is gathered. Both face the problem of office as does virtually no other discipline of inquiry, office bringing in its trail deference on the one hand, and responsibility on the other. In both law and theology true agency is encountered, a problem encountered virtually nowhere else, one person actually acting for another to the point that two persons are merged in thought. Both law and theology countenance obedience

[8] *See* G. STEINER, REAL PRESENCES (1986).

in the form of imitation, the conventional, the liturgical: but only the meaningful is to be so imitated. Both are pressed by the problem of historical actuality, perhaps more than the field of history itself. Both have in them, though they wish they did not, a notion of heresy and, therefore, of that which is not heretical—the necessary tension between poles, abandonment of which is abandonment of the enterprise.[9] Both struggle with the problems of a canon, a deliberately limited textual focus, and with its enhancement of the capacity to hear, through the focusing of attention, what has not been heard before. Both have within them, though again perhaps they wish they did not, the device of hierarchy and the device of legislation, utterly foreign to the thought—if not the practice—of the natural sciences. Both admit the possibility of substance that lies behind and is different from form though it can be expressed only in form. Both come up against particularity, concreteness, concrete existence, that is linked with every kind of authenticity; and both must penetrate through it. Both recognize the work necessary to hear a voice in language, the active participation in the creation of the person heard to speak, while recognizing also that such work goes forward only if there is a voice to be heard. All these and more can be summed up in that short phrase that folds many problems into one, the problem of belief.

Lastly there is affinity of object: true authority, justification, legitimacy—making the world human without imprisoning it in the merely human; personification, ultimately, of what one experiences as a human being and joinder with the person thus perceived. I will return to this most important and most delicate affinity at the end. It is entwined in method and the problem of belief, for the world of words, or of texts, comes to lawyer and theologian, as to everyone, tagged with a question. The question is, Will you attend, or not? Are words—if not ignored—to be fought against, manipulated, subdued, reduced? Or do you seek to understand? Do you accept the world of words with faith that it is a world, that there is an *it* (though I think the English pronoun here is wrong, too much a neuter), or do you proceed doubting there is anything in words at all? The necessity of action and response to action makes the latter course impossible really for lawyers and theologians alike. And it is the necessity of action and response to action that makes authority

[9] In Philip Lee's expression of it. *See* P. LEE, AGAINST THE PROTESTANT GNOSTICS (1987).

their concern. It is this, too, that separates them from the literary critic, and makes moral philosophy more pertinent to their ontological and epistemological problems than contemporary philosophy of mind or epistemology itself.

If, in speaking of the object of an enterprise, the notion of usefulness is thereby invoked; and if—to take a page from American pragmatism or indeed the method of natural science—the proof of a model or picture or concept is its usefulness; then no model or picture or concept is truly useful, or proven, if it makes us who absorb it lose a sense of our own existence and capacity for responsible action, and leads us down to cessation and self-destruction. Conversely, that which leads us toward a sense of our own existence and away from destruction has its usefulness and its claim to a pragmatist's truth. The worth of law, and a mark of its presence in a particular situation or in a society generally, is not that it imposes order or presents solutions to problems of social coordination, but rather that it makes the objects of action live, and thus helps or indeed makes it possible for the individual in society to be, to think, and to act. Theologians cannot object very strongly to being associated with such an enterprise.

III.

Let us move back and go through in law these three aspects, from which lawyers look to theology and to which theologians should look as they consider the question of affinity.

A.

With respect to method, there is in law evident for all to see a focus on language. Methodological interest in law is primarily interest in that tissue of metaphor, analogy, paradox, fiction, and narrative of which legal discourse so largely consists—in what reading is and how it works and what is necessary to make it work. Correlatively, there is a basic premise that "texts matter," as Geoffrey Miller puts it,[10] texts matter and reading them closely matters. This very nearly goes without saying, and needs be said only because the various formulations of what law is, to which all are exposed from high school on, continue to mislead, portraying law

[10] Miller, *The Glittering Eye of the Law*, 84 MICH. L. REV. 880, 880 (1986).

as the vehicle of civil power corresponding to and marching along with the military organization of society; or as the settling of disputes in discrete cases as a jury, a maharajah, a khadhi, a Solomon might do justice; or as the making of rules of a quasi-mathematical kind ready for application through a process of deductive logic. Each of these models of law—we might designate them, unfairly of course, the South American, the Middle Eastern, and the Northeastern (or Oxford) views—is untrue to the lawyer's experience of law, so much so that students entering law school are perpetually surprised. In the United States they are surprised from the moment they pick up the teaching materials used throughout the country, the "casebooks" that look very much like the Byzantine *florilegia* described so engagingly by Jaroslav Pelikan in *The Vindication of Tradition.*[11]

Texts matter to lawyers, not because lawyers are now perhaps the only actors in the great world who know how and are willing to read, but because without texts there really is no law. Without texts, or with a reading of and reference to texts which is not serious, which is manipulative, decorative, or an afterthought, discussion of legal problems is no more than speculation about what the discussants would do if they had some physical capacity to order other people around—an exercise, or disguised exercise, in authoritarianism. There is a little test one can run from time to time, to remind oneself that texts matter, when in or listening to a discussion about why a law or the law is good or bad. If the question arises what the law is, whether a statement of law made by someone in the discussion is the law, notice what is done. There is a turn to texts, and a placing of one text against another and then another and then another. Or when reading economic or feminist or Marxist or sociological or historical explication or passionate criticism or passionate defense of one or another aspect of law, look at what the writer does to establish the law that is the object of his or her interest. You will see—perhaps in only a flash—a lapse from the economic, feminist, Marxist, social scientific, historicist or whatever other speculative framework is being used, into

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[11] J. PELIKAN, THE VINDICATION OF TRADITION 72-77 (1984). A Byzantine literary genre, the *florilegium* or "bouquet" was a treatise on a theological subject consisting almost entirely of quotations from church fathers and church councils, selected and arranged by the treatise writer. *Id.*

standard legal method, and the adoption, again perhaps only for an instant, of the presuppositions of standard legal method. There will be a turn to texts, to citation and reading, and then a (challengeable) statement of what the law is, derived by lawyers' method, the only method by which law can be derived.

Lawyers are in fact very odd, by what are ostensibly today's standards, working with words that cannot be digitalized or captured in formulae without killing them and taking away their power to move; operating with faith that there is meaning in language which is worth the never-ending effort to discover it and which unfolds over time in statement and restatement; always speaking for another and generally supra-individual entity, a "court," an "agency," a "legislature," a "state," a "nation," an "international community," "the law" itself. Among the articulate and disciplined there are few anymore who are like lawyers. But oddness always depends upon vantage point. A decade ago the critic George Steiner placed Heideggerian existentialism next to "the two other great models of man's fall in modern Western culture: the Marxist, and the therapeutic," with revolution on the one hand, and psychological amendment of personality on the other, as cures to be pursued.[12] Were Steiner to make the comment today at an American law school, there is a strong chance the response might be that there is yet another, a fourth great model of man's fall and its cure in modern Western culture, at least in the United States. Indeed it is perhaps the central and dominant model. Quietly persisting, not acknowledging itself theological but unable to escape its resemblance, it is the model of legal discourse. And in view of Steiner's criticism of post-war philosophy and literary theory as living on theological capital, and his choice of Karl Barth over Roland Barthes as author of "the most acute inquiry into the meanings of meaning after the war,"[13] it is possible he might be brought to agree—as also might one working with the original of all such models.

The lawyer's special interest in language, in the depths of its meaning, or in its absence of meaning where that is the case, is of course not simply a given, an interest that drives itself. The law-

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[12] G. STEINER, HEIDEGGER 95 (1978).

[13] Steiner, *New Movements in European Culture*, Times Literary Supp., Jan. 1-8, 1988, at 10.

yer's interest is driven both overtly and implicitly by the object of the discipline, authority, which is to be contrasted with power though it is never far from power. And the feeding of the one concern, language, by the other, authority, extends from a recognition of and a working with the metaphorical and figurative, the non-mathematical element in legal language, all the way up to the question who the author of a legal text can be said to be, a question to which we will return after speaking of the second source of affinity.

B.

The persistent problems of law as a discipline—analytical, practical, even psychological—can be folded, I suggested, into the problem of belief. Lawyers face not just a problem of belief as individuals, but a problem of belief as lawyers: belief in what they say and belief that what they say to be the law is the law—their form of authenticity—and belief also, perhaps, in the supra-individual entities of which they constantly speak. Without such belief law is not law. Law is legalism, empty tyranny to be resisted and overcome like any other lifeless constriction. Yet the skeptical relativist is large in the usual picture of the lawyer, and lawyers themselves tend to foster portrayal of lawyers as having nothing to do with the human experience of belief. This is explicable in some slight part as a product of publicity given lawyers in their litigating role, when they are essentially engaged in war. Of greater importance is that, in the initial study of law, a struggle with one's beliefs when one is asked to see all aspects of a situation is a standard experience and the standard thought occurs that belief of any kind is impossible. But the expansion of the framework of conscious thought to the institutional and of the methods of conscious thought to the dialectic—what is involved in seeing many sides to a question—is surely not the principal reason for the lawyer's problem of belief. The principal reason is that in the practice and even the analysis of law there is a coming into a situation where belief truly matters, where one is responsible, where one acts on belief and belief has consequences, in flows of money, in caging human beings, in taking away children from a parent: terrible, real consequences.

I have referred already to the faith lawyers can display with respect to language. It is sometimes called *good faith*, which is seriousness. Not that humor is unnecessary; it is essential to getting

through a day of the practice of law. But in law one comes face to face with the serious, taking texts seriously, reading seriously, doing the best you can in working with legal method, speaking as best you know how, reading as best you know how—except, of course, when you are one-sided and playing a part in a game, in which case you are not serious and no one expects you to be. It is in seeking to know what the law is, which is the same as seeking to know what you ought to do and urge others to do or order them to do—as advisor to an institution or to an individual, or as judge or government attorney—that you are brought to ask and find yourself asking, "What do I really think?," and, "Is what I really think what I should be thinking?"

For the intellectually self-conscious among lawyers this is a shock. The English-speaking particularly come to the study and practice of law from a celebration of the tradition of Newton, Hobbes, Locke, Mill, Darwin, defining the terms of intellectual discourse and proposing an ideal of truth that is objective (in contrast to personal), disinterested (in contrast to committed), culture-free (in contrast to culturally and linguistically embedded), and premised largely upon mathematics and mathematical "language" as the paradigm of thought and expression. But truth so contemplated is objective, disinterested, culture-free, and, as is said, "true" because, like a mathematical equation, it is empty, tautological, without reference to objects or ends or value beyond the value of form itself. In legal thinking you must struggle with ends and value beyond form.[14] And *you* must struggle; the law and legal thinking do not struggle for you. What the law does is make impossible escape from what we now call the question of value. All of us actually, I think, only toy with the idea of a truth in which we are not interested, toy and play with it. Then in the dark, or on a Saturday afternoon, we sometimes allow ourselves to glance at what we really believe. And what we really believe often turns out to be rather startling to the modern sensibility. The problem with law is that legal thinking tends to tease what we really believe out of us.

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[14] In this, law may go beyond the authority and search for authority described by Vicki Hearne in V. HEARNE, ADAM'S TASK: CALLING ANIMALS BY NAME (1987), which pursues in an unusual context the connection between personification and the experience of authentic speech. Much, however, is implicit in her practical confrontation of (in Stanley Cavell's phrase) the avoidance of love.

To be sure, if you are a lawyer, not stopping and asking might be the better course—not stopping and asking yourself what on earth you are doing in constructing the mind of the Supreme Court on some particular question, out of texts scattered through decades and centuries and spoken on behalf of the Court by a variety of individuals. It is all so focused upon the supra-individual. It takes you so far into substance. Better that you go ahead and do it without thinking about it, if not thinking about it helps you do it. But you do have to think about it if the claim is seriously entertained that we could do without the construction of a mind that cares about what it is saying, and about us.[15]

Further, if there is to be belief, there must be a you to engage in the believing, or perhaps I should say to *be* the believing. If you have to struggle with ends and value, it is well that you have a sense there is a you adequate to the struggle. Not surprisingly, therefore, within law schools and in contemporary thinking about law the involvement of law in reality of self—what many might rather term character, in both its individual and its communal sense—is increasingly a focus of argument and inquiry. There has been a useful parallel developing in theology.[16] In law this focus is larger than what is necessary to a lawyer's stance or attitude or method. It affects legal conclusions, directly, on the reach of the first amendment, for example,[17] or, more pervasively, by blurring distinctions between truth and person. Just as, methodologically, deference to another is not really possible if it appears the other does not believe what he is saying, so, epistemologically, exploring seriously the truth of a statement may be difficult or impossible if the speaker, understood as a whole in view of all he says and does, does not himself appear to believe it. Believe it, but still with an open mind: as the listener, explorer, must have an open mind to explore seriously; speaking and meaning, but speaking to, and in speaking to also listening to, to the response of the listener, which enters then also into belief; the one, believing, being always a

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[15] The internal difficulty of the lawyer may be seen projected in the disturbance raised recently by Philip Soper's working within the analytic tradition of modern jurisprudence to a connection between the existence of law and the presence of belief among those who claim to speak and administer law in the justice of what they say and do. *See* P. SOPER, A THEORY OF LAW (1984).

[16] *E.g.*, S. HAUERWAS, A COMMUNITY OF CHARACTER (1981).

[17] *See* L. BOLLINGER, THE TOLERANT SOCIETY (1986).

merging of the two over time.

I would not want to be understood as proposing that belief in a statement of law makes it law, although I think the late Robert Cover might have gone so far.[18] The lawyer is asked, "What do you conclude? Do you really think that is the law? Do you mean it?" And the lawyer will also be asked, "What do you think of how you reached your conclusion?" And both the lawyer questioned and her interlocutors will be interested in what the lawyer really thinks about how she reached her conclusion, because that will affect what both the lawyer and they think about her conclusion. But the lawyer will also be asked, "How *did* you reach your conclusion?" We may pay attention to a lawyer's statement of law, pay it the tribute of trying to understand it, without in the end using it ourselves, and, in fact, she may not use it herself if discussion of her method raises too many questions. Should she persist, the actuality of her belief may come into doubt in the eyes of others, if not her own. A concise way of putting the matter is that if in legal thinking there is no divide between the subjective and the objective, this does not mean that lawyers fall into the abyss of relativistic subjectivity. The similar claim in theology may be lawyers' best hope for reassurance when they approach that abyss and look into it.

C.

The third source of affinity, the phenomenon of authority, can be separated only with difficulty from method and belief.

From the moment of entry into the study and practice of law, you are asked to take and experiment with two very different attitudes or approaches toward statements and sets of texts, one approach exhibiting or presupposing good faith, the other approach manipulative and detached. When you pursue the second under skillful guidance you discover to your surprise how clever you can be. Then in the midst of the reveling in cleverness that follows, something nudges you to ask "Where is the law in all this?"

It is certainly not in anything so crude as a prediction of "what the courts will do," which, like the pose of skeptical relativism, has been close at hand at least since Holmes for lawyers to seize on in time of trouble. Law is not to be found there, not only because

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[18] *See, e.g.*, Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

courts do anything at all in the minutest minority of cases that require a lawyer's attention, but because the term "what," the term "court," and the term "do," in the phrase "what courts do," are all quite undefined and rapidly take you right back to your problem when you try to expand upon them. Indeed you find yourself asking, pushed by your own activity to ask, in what sense a statement you are reading only in order to dissolve it or get around it is *there* for you at all, especially as you discover the happy or unhappy truth that if given enough time and resources—and time, for these purposes, is a commodity that can be bought—clever lawyers can get around almost anything. Then the more general question arises whether law in any way sensed as a set of statements "out there," interlocking with one another, will not inevitably be treated as something to be dissolved or gotten around, and thus will, again paradoxically, not be there. No human being wants to be caged. Authority, in that larger sense of something to be taken into oneself and allowed to guide one's thinking and decision, and the existence or not of law itself, converge.

Any such movement of thought as this relies upon an understanding of language, implicitly imparted, that there is little if any literal meaning to it. Some would disagree with so strong a statement and insist there is a difference between "the law" and "the spirit," including the "spirit" of the law. But there remains the experience lawyers have, all lawyers, not just tax lawyers or labor lawyers, that any attempt to specify and define in a quasi-mathematical way leads to deadness in human language, the manipulable, with elaboration of definitional defenses opening up ever new ways to reduce the whole to what is actually called a "dead letter." The five-year-long, ten billion dollar dispute between Pennzoil and Texaco over Getty Oil turned in part on the oilman's understanding of deal-making, "If I give my word, no one can break it; but if I sign this contract, my lawyers can break it."[19] I do not suggest that this pithy summary, contrasting *word*, with a person's good faith behind it, and *contract*, indicates what legal contracts are or should be. But it does point to the basic line or gulf that lawyers' clients know and lawyers become experienced in traversing, between living words and dead words, living law and dead thing, effective law and devices to free the nimble and the wealthy and

[19] T. PETZINGER, OIL AND HONOR 18 (1987).

hold the rest.

For lawyers the question is not disobedience or obedience as such. It is how to read. Thus lawyers are forced back over and over again to the question of faith, good faith, both in the making of statements to be read and in the reading of statements for the purpose of making statements. Law is to be found in discourse, as James Boyd White has steadily urged.[20] Law can no more be reduced to rules than what a person says to a friend over time can be reduced to a set of words. And herein lies part of the challenge law presents to modern or post-modern attempts to view man as internally governed by rules: for if you do propose to view the person speaking to you, and whom you try to understand, as governed by or reducible to a set of rules, you cannot use law itself as a model of what you have in mind, or the experience of law as evidence of the plausibility of that view.

And so despite what theologians sometimes say and think of law, law is not formalist. No activity with authority as its object can be formalist. In particular, lawyers do not have and never have had nice specifications of what evidence can be looked to when inquiring what the law is. There is a technique, which is to focus upon a canon of texts and upon central texts—if they are available—generated by an institutional arrangement that is usually in hierarchical form. But in reading those texts, reading them seriously to understand them, lawyers do not close their eyes to evidence of their meaning (or lack of meaning), "*exclude* evidence" as a litigating lawyer would say. Some of that evidence is of the form known as sociological. All the evidence is about the life of the ideas and aspirations and ways of thinking with which lawyers work. Formalism pretends that evidence of the way a term or notion works in the world is not relevant to what the term or notion may be or may mean, and that law is a closed system—pretends and only pretends, because there are no decisions so obviously for ulterior reasons as those emerging from decisionmaking that boasts its formality and self-contained nature, its exclusivity. As a consequence there is also no notion in law of the "purely legal." Legal discussion is not a closed system, but open. The meaning of texts is a real meaning; if not, what is put forward is a species of tyranny. It is for this reason that sociological, historical, and other disci-

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[20] *See* J.B. WHITE, WHEN WORDS LOSE THEIR MEANING (1984).

plined forms of inquiry are found in a law school, even though the school points all its students, including its most contemplative, to practice. Lawyers' work and the way the world works may be in tension, but they are never detached. Legal discourse looks to discourse that is not identified as legal, just as non-legal discourse looks to law and is law laden, always permeated with law and legal reference.

But discourse is between persons. To complete this sketch of law drawn to suggest how really quite natural is a turn, or return, to theology: The normative or the world of value, and the factual, or the supposedly objective "out there," are linked through method; and method, through attitude and the working of human language, is linked to persons, there being in the establishment of the concrete meaning of a word no stopping place before one reaches the person, between the word uttered, and the person who utters it. Without a person on both sides of the transparent divide between speaker and listener language is simply dead. Without mind behind it, it cannot attract mind. Language not paid attention to in any serious way is like that tree falling in the forest about which each of us must once have wondered. Whether it has any sound, whether it is there and happening, makes no difference.

At first glance the persons met in law are familiar—Court, Congress, People, Agency, those seeking to plead, all those whose presence must be recognized before attention is paid to them and they are heard. But they are not individuals; on second glance they may seem peculiar. In facing the persons of law, in situations where what one thinks matters, one must face personification, and, in the end, the question whether the persons lawyers speak about, for, and to are "only imaginary," the pejorative opposite of real. If they are imaginary in this sense, and this is acknowledged, there is a ripple effect back through language and its treatment, to authority, and ultimately to the existence of law. If one thinks the existence of law is evidence of not living in an authoritarian world, one has on one's hands a most serious issue. It is, at its largest, the issue of illusion and necessary self-delusion as on the stage or in art generally. Here law may veer from theology. Law must at least be aware of the possible value of illusion, the possible necessity of it. Theology, I think, presses on.

IV.

There is doubtless a terrible tension in what both lawyers and theologians do, given what tools and methods are put at their disposal for doing it. The tension is the tension, indeed terror, of responsibility in the face of the unknown and the not certainly knowable. Lawyers and theologians reach for the sovereign, look to the sovereign, speak for the sovereign, something or someone to pay serious attention to, or, to use the liturgical term, to praise. They turn to texts. But the texts to which they turn are selected and are old, necessarily from the past, requiring translation over time and between languages and places, year to year, decade to decade. Why do the words "authentic" and "legitimate" punctuate the history of law and the history of theology? They state the object of the work, of course, but their repetition marks repeated doubt and repeated challenge as the work continues.

The Arabic for what lawyers and theologians do is far more evocative than the Latin of our "interpretation" or the Greek of our "hermeneutics"—*ijtihād*, which in English is "struggle" or "toil."[21] The problem of authority is not solved in law by the proposition that peoples which do not amend their constitutions readopt them through inaction, or that legislatures which do not replace statutes adopt them anew, or that legislatures which do not change statutes after a judicial reading of them adopt that judicial reading. Nor is the problem of authority solved, in theology or in law, by injunctions to observe precedent in the course of reading, if only because the reading of precedent is far too complex and turbulent; nor by injunctions to look to a teaching office, the magisterium, for example, of the Roman Catholic Church, and believe it is equally as inspired as the original text; nor, as in Islam, by a prohibition against translation of the original text (one does not avoid the necessity of translation by prohibiting translation). The movement in literary studies and some forms of linguistics to deny that there is any author at all of any text is similar to such devices as these, nothing less nor more than a denial of responsibility, while all

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[21] *See* B. Weiss, The Long Journey Toward God's Law: The Venture of *Usul Al-Fiqh*, paper delivered at the Center for Near Eastern and North African Studies, The University of Michigan (Jan. 20, 1988); Weiss, *Interpretation in Islamic Law: The Theory of* Ijtihād, 26 AM. J. COMP. L. 199, 207-10, 212 (1978). *Cf.* B. LEWIS, THE POLITICAL LANGUAGE OF ISLAM 129 n.11 (1988).

around responsibility is in fact accepted. At each point in speaking and hearing, writing and reading, there is an assertion of responsibility—of *being*. Reading, with translation and restatement for oneself of what is being said, may be speaking for another, but it is also speaking for oneself, as writing, which is speaking for oneself, may also be speaking for another. The culture may be thought to speak through the individual author. It does not speak unless the author speaks. The canon to be read as a whole, in law, in theology, may be the product of selection, but what is selected into it must be marked by the living warmth of the individual seeking—let me not be embarrassed in using the term—the transcendent.

This is so also in art and literature. But when one reaches for authority in law or theology—to say do this or do that, think this or think that, you ought, you must, we will act if you don't, you will suffer, we will bring suffering to you and take responsibility for it and live with what we have done—it may be that what is ultimately being said is not music of the spheres which says no more than that it is. That is not the ultimate. There must be something more. Love is the word that is sometimes used to express it. There are two senses of order, an order which is form, and an order which is a thrust to do or think. They are connected. They are also different. An order, in the sense of form, is not enough to produce an order to do or think. Modern man may wish to laugh at it now, transcendent love, a universe that is ultimately love, not ultimately form. But if, the way we and the world and the universe are, we cannot do without authority, without saying you ought, you must, we will produce suffering and take responsibility for it, I ought, I must, I must suffer if I do not; and if authority is impossible should this something more not exist, then perhaps we have some evidence that what we must believe is true. What we must believe, must be, not because it exists if we believe it exists, but because we exist and have been given the means, by our work, to continue existing.